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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. MIGUEL CEDENO-MARTINEZ, Defendant.	Criminal Case No. 07CR3270-W **UNITED STATES' RESPONSE AND OPPOSITION TO DEFENDANT'S MOTIONS TO:** **(1) COMPEL DISCOVERY AND PRESERVE EVIDENCE;** **(2) SUPPRESS STATEMENTS; AND** **(3) FILE FURTHER MOTIONS** **ALONG WITH UNITED STATES' MOTION FOR RECIPROCAL DISCOVERY** Date: February 4, 2008 Time: 2:00 p.m. Honorable: Thomas Whelan

Plaintiff, United States of America, by and through its counsel, Karen P. Hewitt, United States Attorney, and Christina M. McCall, Assistant United States Attorney and hereby files its Response and Opposition to Defendant's Motions and its Motion for Reciprocal Discovery. This Response and Opposition is based upon the files and records of the case together with the attached statement of facts and memorandum of points and authorities.

I

STATEMENT OF FACTS

A. Defendant's Apprehension

On November 13, 2007, Border Patrol Agent Herrera was working in an area known as Whiskey Two. Whiskey Two is about 50 yards west of the San Ysidro port of entry and is about 10 yards north of the border fence. This area is notorious for the entry of illegal immigrants and is known to be operated by a violent alien smuggling organization known as Linea Trece. Linea Trece has used tactics suck as rock-throwing against Border Patrol agents in the area of Whiskey Two.

At around 3:10 a.m., Agent Barragan notified Agent Herrera that he saw several people running northbound on the Interstate 5 free southbound lanes, from Mexico. Agent Herrera drove to the area of 5775 Camiones Way in San Ysidro and saw several people run north and climb into a blue 1989 Chevrolet Astro Minivan with Baja license plates.

As the Astro van started driving away, Agent Herrera began to perform a vehicle stop. Immediately after Agent Herrera activated his vehicles' emergency lights, the Astro van pulled over to the side of the road. A group of people left the van and attempted to flee the scene, leaving the driver and a female front seat passenger inside the van. Defendant, Miguel Cedeno-Martinez, was sitting in the driver's seat. Agent Herrera instructed Defendant to put the van in park and turn off the engine. The front-seat passenger was identified as Xita Xochitl Gonzalez-de Leon. Both Defendant and Gonzalez de Leon were detained as other agents riding in Agent Herrera's vehicle pursued the people who fled the Astro van. These agents detained eight people for questioning. One person was able to escape back to Mexico. Each of these people admitted being citizens of Mexico without documents allowing them to enter the United States. Defendant and Gonzalez-de Leon claimed to have valid visas. Everyone was taken to the Imperial Beach Border Patrol station. Defendant was in possession of a hundred dollars and 200 Mexican pesos.

At the station, agents first advised defendant Jonathan Astorga-Madrigal of his Miranda rights, which Astorga acknowledged and waived. Astorga admitted that he was acting as a foot-guide for undocumented aliens. Astorga explained that he had a medical condition that needed treatment, and that he expected to get paid $200 for his role in crossing one person into the United States.

Agents next advised Defendant of his Miranda rights at 10:42 a.m.. Defendant acknowledged his rights and agreed to be interviewed without the presence of an attorney. This interview was captured on video, except for a few brief sections where the audio portion was recorded but the video screen is obscured by messages about the video camera's battery function. The interview was conducted in a well-lit interview room, in the presence of two Border Patrol agents, neither displaying weapons. The agents asked Defendant which language he preferred, and, at Defendant's request, the entire interview was conducted in Spanish. Defendant indicated that he felt fine and was not under the influence of alcohol or drugs.

Cedeno admitted he is a Mexican citizen, but claimed to have a valid visa to enter the United States. At first, Defendant claimed he was just sitting in the parking lot with Xita Gonzalez-De Leon when a group of people asked him for a ride to San Diego. Defendant admitted that he knew all the people who asked him for a ride were illegally in the United States since he is very familiar with the dynamics of illegal immigration. Defendant said he did not get a chance to make financial arrangements, but he was probably going to charge all the individuals about 100 dollars. Defendant eventually admitted that the only purpose of his presence in the area so close to the border was to pick up two undocumented aliens and provide transportation for them. Defendant then admitted that he made arrangements with a person over the phone while he was sitting in the parking lot, and that he would be paid 150 dollars.

Officers also interviewed the people who were apprehended after fleeing the Astro van. Material witness Angelica Valdez-Legaria said is a Mexican citizen who traveled from Mexico City to Tijuana to be illegally smuggled into the United States. Valdez said her family was to pay about 2500 dollars to smuggle her and identified Astorga as her foot guide. Valdez said she followed Astorga into the United States, but did not enter a vehicle because by the time she approached the vehicle, other people started running back toward her. Valdez stated that she observed a male (identified through a photographic lineup as Defendent, Cedeno) and a female (identified through a photographic lineup as Gonzalez-de Leon) who were not part of the initial group that crossed illegally into the United States.

Material witness Juan Antonio Garcia-Jimenez stated that a friend made arrangements with an unidentified individual to smuggle Garcia into the United States. Garcia expected to pay a smuggling fee of 2,500 dollars. Garcia identified Astorga as his foot guide. Garcia claimed that, when he approached the vehicle, others in the group started running back toward him. Garcia observed the driver when the driver was taken into custody and identified the driver as Defendant, Cedeno.

Material witness Jose Esparza-Castaneda said that he made arrangements with an unknown man to be smuggled to San Fernando for 2,500 dollars. The unknown man introduced Esparza to the foot guide, identified by photo lineup as Astorga. Esparza followed Astorga to a blue Chevrolet Astro van that was waiting at the curb. Esparza followed Astorge into the van and identified the driver as Defendant. Esparza said that when the Border Patrol vehicle approached the van, he saw Astorga climb out of the van and run back toward Mexico.

On December 4, 2007, a federal grand jury for the Southern District of California returned a six-count Indictment against defendants Cedeno and Astorga, charging them with: (1) bringing in an illegal alien-- Juan Antonio Garcia-Jimenez-- for financial gain, in violation of Title 8 U.S.C. § 1324(a)(2)(B)(ii); (2) transporting an alien-- Juan Antonio Garcia-Jimenez-- within the United States, in violation of Title 8 U.S.C. § 1324(a)(1)(A)(ii) and (v)(II); (3) bringing in an illegal alien--Jose Salvador Esparza-Casteneda-- for financial gain, in violation of Title 8 U.S.C. § 1324(a)(2)(B)(ii); (4) transporting an alien--Jose Salvador Esparza-Casteneda-- within the United States, in violation of Title 8 U.S.C. § 1324(a)(1)(A)(ii) and (v)(II); (5) bringing in an illegal alien-- Angelica Valdez-Legaria-- for financial gain, in violation of Title 8 U.S.C. § 1324(a)(2)(B)(ii); and (2) transporting an alien--Angelica Valdez-Legaria-- within the United States, in violation of Title 8 U.S.C. § 1324(a)(1)(A)(ii) and (v)(II). At the arraignment on the Indictment on December 13, 2007, both defendants entered a not-guilty plea.

II

UNITED STATES' RESPONSE AND OPPOSITION TO DEFENDANT'S MOTIONS

A. ORDER COMPELLING DISCOVERY IS UNNECESSARY

No Order is Required; The United States is Complying With Discovery Obligations

The United States has produced 194 pages of discovery as of the filing of this response, as well as a digital video recording of the defendants' post-arrest statements and the interview with the material witnesses. The United States has complied and will continue to comply with its discovery obligations under Brady v. Maryland, 373 U.S. 83 (1963), the Jenks Act (18 U.S.C. §3500), and Federal Rule of

Criminal Procedure 16. Because the United States has complied and will comply with its discovery obligations, an order to compel discovery is unwarranted and the request for such an order should be denied.

1. Brady Material

The United States will comply with its obligations to disclose exculpatory evidence under Brady v. Maryland, 373 U.S. 83 (1963). Under Brady and United States v. Agurs, 427 U.S. 97 (1976), the government need not disclose "every bit of information that might affect the jury's decision." United States v. Gardner, 611 F.2d 770, 774-75 (9th Cir. 1980). The standard for disclosure is materiality. Id. "Evidence is material under Brady only if there is a reasonable probability that the result of the proceeding would have been different had it been disclosed to the defense." United States v. Antonakeas, 255 F.3d 714, 725 (9th Cir. 2001). Impeachment evidence may constitute Brady material "when the reliability of the witness may be determinative of a criminal defendant's guilt or innocence." United States v. Blanco, 392 F.3d 382, 387 (9th Cir. 2004) (internal quotation marks omitted).

2. 404(b) Evidence

The United States will disclose sufficiently in advance of trial the general nature of any prior acts evidence that it intends to introduce at trial pursuant to Federal Rule of Evidence 404(b).

3. Preservation of Evidence

The United States will preserve all evidence to which the defendant is entitled to pursuant to the relevant discovery rules. The United States objects to a blanket request to preserve all physical evidence.

4. Defendant's Statements

The United States has already provided defense counsel with incident reports detailing Defendant's brief statements in primary, as well as a DVD recording of his post-arrest interview.

5. Tangible Objects

The United States has complied and will continue to comply with Fed. R. Crim. P. 16(a)(1)(E) in allowing Defendant an opportunity, upon reasonable notice, to examine, inspect, and copy tangible objects that are within its possession, custody, or control, and that is either material to the preparation of Defendant's defense, or is intended for use by the United States as evidence during its case-in-chief at trial, or was obtained from or belongs to Defendant.

6. Expert Witnesses

The United States will comply with Fed. R. Crim. P. 16(a)(1)(G) and provide Defendant with notice and a written summary of any expert testimony that the United States intends to use during its case-in-chief at trial under Rules 702, 703, or 705 of the Federal Rules of Evidence.

7. Witness Addresses

The United States will provide the names of the witnesses it intends to call at trial. Similarly, the government trusts that Defendant will provide the names of the witnesses he intends to call. Defendant has already been provided access to the names of potential witnesses through the discovery sent to her counsel. The United States strongly objects to Defendant's request for witness addresses. No cases cited by Defendant, nor any rule of discovery, requires the United States to disclose witness addresses. The United States does not know of any individuals who were witnesses to Defendant's offenses except the law enforcement agents who apprehended her and the material witnesses. The names of these individuals have already been provided to Defendant.

8. Jencks Act Material

The United States has or will comply with the disclosure requirements of the Jencks Act. For purposes of the Jencks Act, a "statement" is (1) a written statement made by the witness and signed or otherwise adopted or approved by him, (2) a substantially verbatim, contemporaneously recorded transcription of the witness's oral statement, or (3) a statement by the witness before a grand jury. 18 U.S.C. § 3500(e). Notes of an interview only constitute statements discoverable under the Jencks Act if the statements are adopted by the witness, as when the notes are read back to a witness to see whether or not the government agent correctly understood what the witness was saying. United States v. Boshell, 952 F.2d 1101, 1105 (9th Cir. 1991) (citing Goldberg v. United States, 425 U.S. 94, 98 (1976)). By the same token, rough notes by an agent "are not producible under the Jencks Act due to the incomplete nature of the notes." United States v. Cedano-Arellano, 332 F.3d 568, 571 (9th Cir. 2004).

The United States is not aware of any dispatch tapes containing Jencks Act material in this case.

9. Informants and Cooperating Witnesses

At this time, the United States is not aware of any confidential informants or cooperating witnesses involved in this case, other than the two women identified and held as material witnesses. The government must generally disclose the identity of informants where (1) the informant is a material witness, or (2) the informant's testimony is crucial to the defense. Roviaro v. United States, 353 U.S. 53, 59 (1957). These threshold requirements have been interpreted to require that, if any cooperating witnesses or informants were involved or become involved, Defendant must show that disclosure of the informer's identity would be "relevant and helpful" or that the informer was the sole percipient witness before he would even be entitled to an in-camera evidentiary hearing regarding disclosure of the informer's identity. United States v. Jaramillo-Suarez, 950 F.2d 1378, 1386-87 (9th Cir. 1991), quoting Roviaro v. United States, 353 U.S. 53, 60 (1957). Any bias issues will be handled pursuant to Brady.

10. Scientific Requests

a. Request for A-files

The United States will provide access to the material witnesses' alien files.

b. Request to view co-defendant's statement

The government will provide a recording of the co-defendant's post-arrest statement..

c. Information regarding the released aliens

The prosecutor will attempt to locate information relating to other aliens apprehended with the defendants in this case and will turn that information over to defense counsel.

11. Residual Request

As stated above, the United States will comply with its discovery obligations in a timely manner.

B. THE POST-ARREST STATEMENTS SHOULD NOT BE SUPPRESSED

______Defendant moves to suppress all statements made to government officials, on the basis of an alleged Miranda violation. Defendant argues that there are three reasons why his post-arrest statement should be suppressed: (1) the Miranda rights were confusing because they were given after the administrative rights; (2) agents told Defendant that he could contact he Mexican consulate after his interview; and (3) the explanation of the right to an attorney was unclear.

1. Defendant's Motion Should be Denied Without a Hearing

______The Court should deny the motion to suppress without a hearing. Under Ninth Circuit precedent and Southern District Local Criminal Rule 47.1(g)(1), a defendant is entitled to an evidentiary hearing on a motion to suppress only when the defendant puts forth, in a declaration, sufficient facts to require a factual finding. United States v. Batiste, 868 F.2d 1089, 1098 (9th Cir. 1989) ("defendant, in his motion to suppress, failed to dispute any material fact in the government's proffer, . . . the district court was not required to hold an evidentiary hearing."). "A hearing will not be held on a defendant's pretrial motion to suppress merely because a defendant wants one. Rather, the defendant must demonstrate that a 'significant disputed factual issue exists such that a hearing is required.'" United States v. Howell, 231 F.3d 615, 621(9th Cir. 2000) (citations omitted).

Here, Defendant has failed to support his allegations with a declaration, in clear opposition to Local Rule 47.1(g). Defendant also fails to provide any factual support that a violation of Miranda occurred, in the form of a transcript, a translation of the videotape of Defendant's post-arrest interview, a declaration of a percipient witness, or the forms that Defendant signed, acknowledging his constitutional rights. This Court should deny Defendant's motion to suppress the statements he made to officials on the day of his arrest.

2. The Miranda Warnings Effectively Conveyed Defendant's Rights

Defendant was informed of the Miranda rights in his native language. It is difficult to see what is wrong with the prophylactic protections phrased almost identically to those in the Miranda case itself. This warning is not defective. Defendant signed the "waiver of rights" form, and initialed twice, indicating that he understood the rights that were read to him, before speaking about the offense. (Exhibit 1.)

3. Defendant Knowingly, Voluntarily and Intelligently Waived His Rights

The case agent read the Miranda warnings to Defendant. Defendant signed the waiver form and wrote his initials next to each of the enumerated rights. The environment was free of physical intimidation; Defendant was not handcuffed during the interview, which took place in a well-lit room with two unarmed Spanish-speaking agents present and two unlocked doors. Defendant's demeanor on the videotape is relaxed, and his responses to questions were appropriate and coherent. All the evidence indicates that Defendant knowingly, voluntarily, and intelligently waived his rights. His statements should be admitted.

4. Delayed Consular Notification Does Not Result in Suppression

There was no violation of the Vienna Convention's provisions regarding consular notification in this case. First, the Vienna convention bestows no right to have an interrogation cease once a suspect in custody indicates a desire to contact his nation's consulate offices. Second, even assuming any violation took place, the appropriate remedy for any violation of the Vienna convention is not suppression.

In United States v. Jose Lombera-Camorlinga, 206 F.3d 882, 889 (9th Cir. 2000), the Ninth Circuit clearly held that "a foreign national's post-arrest statements should not be excluded solely because he made them before being told of his right to consular notification." The *en banc* court found that suppression of evidence is not the appropriate remedy for a violation of the Vienna Convention. In Lombera, the law enforcement officers did not inform Lombera of his rights under the Vienna Convention; in this case, the agents duly notified Defendant of his rights and allowed him to contact the Mexican consulate after his interview. "[T]he treaty does not link the required consular notification in any way to the commencement of police interrogation. Nor does the treaty, as Miranda does, require law enforcement officials to cease interrogation once the arrestee invokes his right." Id. at 886.

4. San Juan Cruz Does Not Require Suppression

The report generated from Defendant's arrest does not indicate that Defendant was ever issued his administrative rights before being given his Miranda rights and being interviewed. In fact, the administrative rights form, I-826, indicates that the administrative rights notification was provided long after the interview. (Exhibit 2.) The videotaped interview of Defendant began at 10:37 a.m. on November 13, 2007. The I-826 notification of administrative rights form has an indication that Defendant was advised of the administrative rights long after the interview: at 2:00 p.m. In that case, Defendant could not have been confused by the administrative rights advisal, since they were given long after he was advised of his Miranda rights and completed the videotaped interview.

C. LEAVE TO FILE FURTHER MOTIONS

The United States does not oppose Defendant's request for leave to file further motions, so long as such motions are based on discovery not yet received by Defendant.

III

UNITED STATES' MOTION FOR RECIPROCAL DISCOVERY

Defendant has invoked Fed. R. Crim. P. 16(a) and the United States has voluntarily complied with the requirements of Rule 16(a). Therefore, provision 16(b) of that rule, requiring reciprocal discovery, is applicable. The United States hereby requests Defendant to permit the United States to inspect, copy, and photograph any and all books, papers, documents, photographs, tangible objects, or make copies of portions thereof, which are within the possession, custody or control of Defendant and which he intends to introduce as evidence in her case-in-chief at trial.

The United States further requests that it be permitted to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with this case, which are in the possession or control of Defendant, which he intends to introduce as evidence-in-chief at the trial or which were prepared by a witness whom Defendant intends to call as a witness. The United States also requests that the court make such orders as it deems necessary under Rule 16(d)(1) and (2) to insure that the United States receives the discovery to which it is entitled.

Federal Rule of Criminal Procedure 26.2 requires the production of prior statements of all witnesses, except Defendant. The time frame established by the rule requires the statement to be provided after the witness has testified, as in the Jencks Act. The United States hereby requests that Defendant be ordered to supply all prior statements of defense witnesses by a reasonable date before trial to be set by the court. This order should include any form these statements are memorialized in, including but not limited to, tape recordings, handwritten or typed notes and/or reports.

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V

CONCLUSION

For the foregoing reasons, the United States respectfully requests that Defendant's motions, except where not opposed, be denied and the United States' motion for reciprocal discovery be granted.

DATED: January 28, 2008

Respectfully Submitted,

KAREN P. HEWITT
United States Attorney

/s/ Christina M. McCall

CHRISTINA M. McCALL
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. MIGUEL CEDENO-MARTINEZ, Defendant.	Case No. 07CR3270-W **CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED that:

I, CHRISTINA M. McCALL, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101.

I am not a party to the above-entitled action. I have caused service of RESPONSE AND OPPOSITION TO DEFENDANT'S MOTION TO COMPEL DISCOVERY AND SUPPRESS STATEMENTS on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Robert Rexrode, Esq.
Tamara DeHaan, Esq.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 28, 2008.

/s/ Christina M. McCall

CHRISTINA M. McCALL